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04-AP-A

Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day  
Washington's Birthday, Memorial Day, Independence Day, Labor  
Day, Columbus Day, Veterans' Day, Thanksgiving Day, and  
Christmas Day.

\* \* \* \* \*

#### Committee Note

**Subdivision (a)(2).** Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

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#### C. New Rule 27(d)(1)(E)

The Advisory Committee proposes to add a new subdivision (E) to Rule 27(d)(1) to make it clear that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motion papers. Applying these restrictions to motion papers is necessary to prevent abuses — such as litigants using very small typeface to cram as many words as possible into the pages that they are permitted.

The Advisory Committee unanimously approved this amendment at our November 2002 meeting.

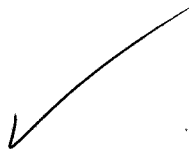
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#### Rule 27. Motions

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#### (d) Form of Papers; Page Limits; and Number of Copies.

##### (1) Format.

- 1 (A) **Reproduction.** A motion, response, or reply may be  
2 reproduced by any process that yields a clear black image  
3 on light paper. The paper must be opaque and unglazed.  
4 Only one side of the paper may be used.
- 5 (B) **Cover.** A cover is not required, but there must be a caption  
6 that includes the case number, the name of the court, the  
7 title of the case, and a brief descriptive title indicating the  
8 purpose of the motion and identifying the party or parties  
9 for whom it is filed. If a cover is used, it must be white.
- 10 (C) **Binding.** The document must be bound in any manner that  
11 is secure, does not obscure the text, and permits the  
12 document to lie reasonably flat when open.
- 13 (D) <sup>S L S M</sup>  
**Paper size, line spacing, and margins.** The document  
14 must be on 8½ by 11 inch paper. The text must be double-  
15 spaced, but quotations more than two lines long may be  
16 indented and single-spaced. Headings and footnotes may  
17 be single-spaced. Margins must be at least one inch on all  
18 four sides. Page numbers may be placed in the margins,  
19 but no text may appear there.
- 20 (E) **Typeface and type styles.** The document must comply  
21 with the typeface requirements of Rule 32(a)(5) and the  
22 type-style requirements of Rule 32(a)(6).
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1 **Rule 28.1. Cross-Appeals**

2 **(a) Applicability.** This rule applies to a case in which a cross-appeal is filed.  
3 Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to  
4 such a case, except as otherwise provided in this rule.

5 **(b) Designation of Appellant.** The party who files a notice of appeal first is  
6 the appellant for the purposes of this rule and Rules 30 and 34. If notices  
7 are filed on the same day, the plaintiff in the proceeding below is the  
8 appellant. These designations may be modified by agreement of the  
9 parties or by court order. *the parties' ✓*

10 **(c) Briefs.** In a case involving a cross-appeal:

11 **(1) Appellant's Principal Brief.** The appellant must file a principal  
12 brief in the appeal. That brief must comply with Rule 28(a).

13 **(2) Appellee's Principal and Response Brief.** The appellee must file  
14 a principal brief in the cross-appeal and must, in the same brief,  
15 respond to the principal brief in the appeal. That appellee's brief  
16 must comply with Rule 28(a), except that the brief need not include  
17 a statement of the case or a statement of the facts unless the  
18 appellee is dissatisfied with the appellant's statement.

19 **(3) Appellant's Response and Reply Brief.** The appellant must file a  
20 brief that responds to the principal brief in the cross-appeal and  
21 may, in the same brief, reply to the response in the appeal. That  
22 brief must comply with Rule 28(a)(2)–(9) and (11), except that

1 none of the following need appear unless the appellant is  
2 dissatisfied with the appellee's statement in the cross-appeal:

3 (A) the jurisdictional statement;

4 (B) the statement of the issues;

5 (C) the statement of the case;

6 (D) the statement of the facts; and

7 (E) the statement of the standard of review.

8 (4) **Appellee's Reply Brief.** The appellee may file a brief in reply to  
9 the response in the cross-appeal. That brief must comply with Rule  
10 28(a)(2)–(3) and (11), <sup>and</sup> That brief must also be limited to the issues  
11 presented by the cross-appeal.

12 (5) **No Further Briefs.** Unless the court permits, no further briefs  
13 may be filed in a case involving a cross-appeal.

14 (d) **Cover.** Except for filings by unrepresented parties, the cover of the  
15 appellant's principal brief must be blue; the appellee's principal and  
16 response brief, red; the appellant's response and reply brief, yellow; and  
17 the appellee's reply brief, gray. The front cover of a brief must contain the  
18 information required by Rule 32(a)(2).

19 (e) **Length.**

20 (1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3),  
21 the appellant's principal brief must not exceed 30 pages; the  
22 appellee's principal and response brief, 35 pages; the appellant's

response and reply brief, 30 pages; and the appellee's reply brief,  
15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response  
and reply brief is acceptable if:

- (i) it contains no more than 14,000 words; or
- (ii) it uses a monospaced face and contains no more  
than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

- (i) it contains no more than 16,500 words; or
- (ii) it uses a monospaced face and contains no more  
than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no  
more than half of the type volume specified in Rule  
28.1(e)(2)(A).

(3) **Certificate of Compliance.** A brief submitted under Rule 28(e)(2)  
must comply with Rule 32(a)(7)(C).

(f) **Time to Serve and File a Brief.** <sup>(1)</sup> ~~The appellant's principal brief must be~~  
~~served and filed~~ <sup>(2)</sup> within 40 days after the record is filed; ~~The appellee's~~  
~~principal and response brief must be served and filed~~ <sup>(3)</sup> within 30 days after  
the appellant's principal brief is served; ~~the appellant's response and~~  
~~reply brief must be served and filed~~ within 30 days after the appellee's

Briefs must be served and filed  
as follows:  
-14-

**Reprinted Suggested Edits to (f)**

- (f) Time to Serve and File a Brief.** Briefs must be served and filed as follows:
- (a) the appellant's brief, within 40 days after the record is filed;
  - (b) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;
  - (c) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and
  - (d) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but the appellee's reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

and (4)

1            principal and response brief is served; <sup>+</sup> The appellee's reply brief, must be  
2            served and filed within 14 days after the appellant's response and reply  
3            brief is served, but the appellee's reply brief must be filed at least 3 days  
4            before argument, unless the court, for good cause, allows a later filing.

#### Committee Note

5            The Federal Rules of Appellate Procedure have said very little about  
6            briefing in cases involving cross-appeals. This vacuum has frustrated judges,  
7            attorneys, and parties who have sought guidance in the rules. More importantly,  
8            this vacuum has been filled by conflicting local rules regarding such matters as the  
9            number and length of briefs, the colors of the covers of briefs, and the deadlines  
10           for serving and filing briefs. These local rules have created a hardship for  
11           attorneys who practice in more than one circuit.

12           New Rule 28.1 provides a comprehensive set of rules governing briefing  
13           in cases involving cross-appeals. The few existing provisions regarding briefing  
14           in such cases have been moved into new Rule 28.1, and several new provisions  
15           have been added to fill the gaps in the existing rules. The new provisions reflect  
16           the practices of the large majority of circuits and, to a significant extent, the new  
17           provisions have been patterned after the requirements imposed by Rules 28, 31,  
18           and 32 on briefs filed in cases that do not involve cross-appeals.

19           **Subdivision (a).** Subdivision (a) makes clear that, in a case involving a  
20           cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a),  
21           28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent  
22           that Rule 28.1 specifically incorporates those rules by reference.

23           **Subdivision (b).** Subdivision (b) defines who is the "appellant" and who  
24           is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken  
25           directly from former Rule 28(h), except that subdivision (b) refers to a party being  
26           designated as an appellant "for the purposes of this rule and Rules 30 and 34,"  
27           whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed  
28           by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly  
29           in new Rule 28(f), the cross-reference to Rule 31 is no longer necessary.

30           **Subdivision (c).** Subdivision (c) provides for the filing of four briefs in a  
31           case involving a cross-appeal. This reflects the practice of every circuit except the  
32           Seventh. *See* 7th Cir. R. 28(d)(1)(a).

Citing

**Rule 32.1. Citation of Judicial Dispositions**

✓ (a) **Citation Permitted.** No prohibition or restriction may be imposed upon <sup>citing</sup> ~~the citation~~ of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like, unless that prohibition or restriction is generally imposed upon <sup>citing</sup> ~~the citation~~ of all judicial opinions, orders, judgments, or other written dispositions.

✓ (b) **Copies Required.** <sup>If a</sup> ~~A~~ party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database <sup>the party</sup> ~~must~~ file and serve a copy of that opinion, order, judgment, or ~~other written~~ disposition with the brief or other paper in which it is cited.

**Committee Note**

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like. This Note will refer to these dispositions collectively as “unpublished” opinions. This is a term of art that, while not always literally true (as many “unpublished” opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of “unpublished” opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of “unpublished” opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as “unpublished.” Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of “unpublished” opinions, most agree that an “unpublished” opinion of a circuit